IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. _____

JOHNNY ESPINOZA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Notice is hereby given that Johnny Espinoza, the Appellant above named hereby appeals to the Supreme Court of the United States from the final order of the United States Court of Appeals, 5th Circuit, entered on the 1st day of July, 1960, when the Motion for Rehearing was denied. The original judgment was entered on the 5th day of January, 1960 in the District Court.

This appeal is taken pursuant to 28 *USC*, Sec. 1254 (1).

Appellant was convicted of illegally receiving and concealing a quantity of narcotics in violation of Section 174, Title 21, *U. S. Code*; and Appellant was sentenced to ten

years in prison. The Appellant is currently confined at the Federal Penitentiary, Leavenworth, Kansas.

This writ is sought primarily for the violation of the rights of the Defendant when he was arrested.

The main question presented by this Appellant is

1. The Court erred in overruling Defendant's Motion to Suppress Evidence in that the said Agents arrested the Defendant although there was no violation of any local or City Ordinances, State laws or the laws of the United States of America, and began an unlawful search of the Defendant, Defendant's person and automobile without the consent and permission of the Defendant and choked and abused the Defendant in the process.

The record is clear that the agents of the Government attacked the Defendant (R. 15 to 29-30) as shown by the testimony of agents Batista and Robinson; that the Agent Robinson grabbed Defendant by placing his arm around the Defendant's neck and pulling the Defendant as though he had him in a vise (R. 23-59) and dragged the Defendant out of Defendant's automobile (R. 59). It is equally clear that the agents had no warrants at any time and had not seen the Defendant violate any laws.

As evidence of abuse the Defendant's lip was cut and physical force applied to his nose (R. 15). Certainly there could be no illusion that the Defendant was mistreated and abused physically by the officers and it certainly should follow that any evidence obtained from the Defendant as a result of such treatment would be inadmissible in a trial against him.

The fact that the evidence subsequently recovered through such mistreatment did belong to the Defendant

(R. 35) did not change the statutes as to its being used against him when it was obtained in such a manner.

It is clear from the testimony that the Agents were after the Appellant although they had absolutely no evidence of any kind; in this connection your Petitioner would show this Honorable Court that the Agents herein stated they knew him but had never seen him violate any laws.

The Fourth and Fifth Amendments to the Constitution of the United States in reference to illegal search and seizure in due process of law were enacted to prevent such treatment and violence referred to herein. Certainly there was unlawful invasion of the sanctity of the Defendant from which unlawful invasion your Petitioner states he should be protected from by the Fourth and Fifth Amendments of the Constitution of the United States. *The Protection of the Fourth and Fifth Amendments of the Constitution of the United States of America should protect and reach all alike, whether accused of crime or not*, and the duty of giving it force and effect is obligatory on all entrusted under our Federal System for the enforcement of said laws. Certainly, this Court charged with protection of our citizens should give no sanction for such illegal practice performed by those who give so little regard to the rights of those under the laws of our land. The fact that the Defendant herein is of Mexican descent and had a reputation as a narcotics violator with the agents should have no bearing on the facts of this particular case. In this connection your Petitioner would refer this Honorable Court to the *City of Price v. James*, 191 P. 2d 606, 113 Utah 89, wherein it was held that the people's right recognized by the Fourth Amendment to the Constitution to be secure in their persons, houses, papers and effects against

unreasonable search and seizure was originally designed principally to protect citizens in their home from arrest or seizure of his papers and goods there from but immunity from search and seizure without lawful warrant, has been extended to unlawful seizures of persons not in their homes. In *Corpus Juris Secundum* under Searches and Seizures, Paragraph 17, Vol. 79, it states that Constitutional guarantees against unreasonable search and seizure are violated by the seizure of contraband or stolen goods if seizure is brought about by unlawful search and has been held that where the entry on the premises is illegal even though the Defendant may not complain of the illegality, a seizure of a contraband found there constituted a violation of the Constitutional guarantee. In this connection see *U. S. v. Jeffers*, App. D. C. 72 C. S. 93; 342 U.S. 48; 96 Law Edition. The *Jeffers* case was one where the owner of contraband stood in another's hotel room, the police entered the room illegally and seized the contraband, the owner's Constitutional rights were invaded. Applying that to the case at hand, whether it was the invasion of the room of the Defendant, or the person of the Defendant the officers would have to make such invasion with a lawful warrant, which in this case they failed to do. Of course, the question of illegality goes further in this case, due to the manner in which the officers obtained the contraband to-wit, the narcotics; in the case at bar, through the use of violence in attacking the person of the Defendant. A search of person except when made as an instrument to a lawful arrest or with invitation or consent must be made under a valid search warrant therefor. See *Corpus Juris Secundum*, Section 66, Subparagraph B, Volume 79 on Search and Seizures. Certainly in the case at bar neither of the above requisites would apply, as certainly there was no lawful

arrest and certainly there was no invitation or consent to be searched by the Defendant as evidenced by his desire to defend himself. The search of a person without a search warrant is not within the exception as mentioned above as unlawful.

The Court of Appeals based its opinion on *Draper v. United States*, 1959, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327. However, in the *Draper* case there was no violence used which clearly distinguishes it from the case at bar.

In view of the foregoing the trial finding of guilty should be reversed as should the decision of the United States Court of Appeals, 5th Circuit. Appellant herein prays that this Petition for Writ of Certiorari be granted.

ROBERT A. SCARDINO
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Houston 2, Texas

I, _____, Assistant United Attorney, hereby acknowledge receipt of a copy of the foregoing Notice of Appeal to the Supreme Court of the United States this _____ day of _____, 1960.

_____

APPENDIX

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 18190

JOHNNY ESPINOZA, Appellant,
versus
UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

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(June 3, 1960)

Before HUTCHESON, BROWN and WISDOM, Circuit Judges.

PER CURIAM: Defendant (appellant here) was convicted in a trial before the District Court sitting without a jury of knowingly concealing and transporting narcotic drugs in violation of 21 USCA §174. He was sentenced to ten years. His conviction was based in part on the use in evidence of a quantity of narcotics found in his possession at the time of his arrest. Before trial, he moved to suppress that evidence, F.R.Crim.P. 41(e), as having been secured through a search and seizure asserted to have been unlawful for two reasons. First, the arrest, to which the search and seizure was

justified as being incidental, was illegal because it was made without a warrant. Second, the federal officers obtained the evidence from the defendant's mouth as he was attempting to swallow and destroy it by grabbing the defendant about the throat, choking him and attempting to pry open his mouth by placing pressure against his jaw and nose. After a hearing, the District Court found that the arresting officers had probable cause to arrest the defendant without a warrant and that no more force was used than was reasonably necessary under the circumstances. Accordingly, the Court held the search and seizure was incidental to a lawful arrest and overruled the motion to suppress. That ruling is the basis of this appeal.

The arrest of the defendant, a well known narcotics violator, on the basis of information received from a previously reliable informant—that the defendant definitely would be carrying narcotics—occurred under circumstances which gave the agents "probable cause" within the meaning of the Fourth Amendment and "reasonable grounds" within the meaning of 26 USCA §7607[1] to believe that the defendant had committed or was committing a violation of the narcotics laws. *Draper v. United States*, 1959, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed. 2d 327. Therefore, the arrest and incidental search and seizure was lawful.

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1 "The Commissioner * * * and agents of the Bureau of Narcotics * * * may—

"(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation." 26 USCA §7607 (1959 Supp.)

The subsequent circumstances under which the narcotics were taken does not change this. When the defendant was confronted by the officers, he immediately grasped a small package either from his pocket or from the car seat and put it in his mouth. The officers recognized this as an attempt to swallow and destroy what to the officers appeared to be—and was in fact—a quantity of narcotics. The District Court held that in the officers' efforts to retrieve the article and to see that relevant evidence was not destroyed, *Abel v. United States*, 1960, U.S. , 80 S.Ct. , 4 L.Ed.2d 668, 685-686, "no more force was used than was necessary under the circumstances." *King v. United States*, 5 Cir., 1958, 258 F.2d 754, cert. denied, 1959, 359 U.S. 939, 79 S.Ct. 652, 3 L.Ed.2d 639; *Blackford v. United States*, 9 Cir., 1957, 247 F.2d 745, cert. denied, 1958, 356 U.S. 914, 78 S.Ct. 672, 2 L.Ed.2d 586 ;cf. *Rochin v. California*, 1952, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. We affirm.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

_____TERM: 1960

NO._____

JOHNNY ESPINOZA

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UNITED STATES OF AMERICA

ACKNOWLEDGMENT OF SERVICE

BE IT REMEMBERED that on this the_____day of _____, 1960, I, _____, Counsel of record for the United States in the above entitled and numbered cause, herein acknowledge service of the Petitioner's Writ of Certiorari, same having already been docketed in this Honorable Court, as Cause #_____. This is in conformity to Rule 33 (3) (a) regarding proof of service.

_____

Counsel of Record for the United States of America